Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States	IB Docket No. 96-111
and	
Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations	CC Docket No. 93-23 RM-7931
and	
COMMUNICATIONS SATELLITE CORPORATION Request for Waiver of Section 25.131(j)(1) of the Commission's Rules As It applies to Services Provided via the INTELSAT K Satellite	File No. ISP092-007

PETITION FOR CLARIFICATION AND RECONSIDERATION OF ICO GLOBAL COMMUNICATIONS

ICO Global Communications ("ICO"), pursuant to 47 U.S.C. §405 and 47 C.F.R. §1.429, hereby submits this petition for reconsideration of the Report and Order

(FCC 97-399) ("Report and Order") released on November 26, 1997 in these proceedings.[1]

ICO welcomes the Commission's decision to abandon the ECO-Sat test for applications to serve the U.S. from satellites that are licensed or authorized by World Trade Organization ("WTO") nations, including services provided by WTO-member licensed applicants between the United States and non-WTO member countries. The Commission's new approach will substantially advance openness and competition in the U.S. satellite market generally and in the mobile satellite market in particular.

ICO requests, however, that the Commission clarify two decisions included in the Report and Order and reconsider two other decisions. Specifically, ICO requests that the Commission reconsider the redundant licensing requirements its Report and Order imposes on non-U.S. licensees, reconsider its classification of ICO as an IGO affiliate and clarify its frequency coordination requirements and the competition element of its public interest test.

I. The Commission Should Reconsider Its Decision to Impose Redundant Licensing Requirements on Non-U.S. Licensees

The Report and Order concludes that in order to "maximize the number of competitive systems available to customers while ensuring spectrum efficiency," applicants to serve the U.S. market from non-U.S. satellites must comply with the same technical, financial and legal requirements as U.S. applicants.[2] ICO disagrees with this assessment and asks that these requirements be reconsidered as unnecessary and likely to hinder, rather than advance, competition in satellite markets.

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[1] *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States,* IB Docket No. 96-111 FCC 97-399 (November 26, 1997)*("Report and Order").* ICO is developing and will launch and operate a global Mobile Satellite Service ("MSS") system that will enable customers to communicate from anywhere to anywhere in the world. A description of ICO's system is set forth in the initial comments filed by ICO in these proceedings. *See Comments of ICO Global Communications (July 15, 1996) at 3-5.*

[2] Report and Order ¶¶154-159 (citation omitted).

Most fundamentally, the Commission's reporting requirements needlessly impose redundant licensing requirements on *all* non-U.S. applicants because of the Commission's belief that *some* foreign countries' licensing requirements may be less rigorous than those of the FCC. This policy will impose a relicensing regime on applicants that already have complied with requirements that are fully as demanding as those of the United States. ICO, for example, is subject to, and in the process of complying with, the space station authorization requirements of the United Kingdom. Pursuant to the United Kingdom's due diligence and competence requirements regarding operation of a satellite network ICO has supplied to the Department of Trade and Industry ("DTI") technical, financial and legal credentials designed to demonstrate that ICO can construct, launch and operate its system according to its business plan. ICO also submits progress reports to DTI and submits detailed corporate and system information to the British National Space Center pursuant to the United Kingdom's Outer Space Act. These requirements are no less exacting than the technical, financial and legal reporting requirements of the FCC.[3]

The Commission should not base its reporting rules on a presumption that foreign licensing regulations are inadequate to evaluate the technical, financial and legal capabilities of non-U.S. satellite systems and operators. The Commission either should eliminate its redundant licensing requirements altogether or should adopt a presumption that non-U.S. applicants that have complied with foreign licensing requirements are qualified to serve the

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[3] As ICO pointed out in its Further Comments, the Commission is justified in requiring certain technical information from non-U.S. licensed satellite operators for both international and domestic coordination purposes. Further Comments of ICO Global Communications at 19 (August 21, 1997) ("ICO Further Comments"). ICO disagrees,

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U.S. market. Where the presumption is overcome by clear evidence that an applicant's system was licensed or authorized under a licensing or authorization process that did not require a demonstration of technical, financial or legal capabilities, the Commission could then impose reasonable reporting requirements to ensure that the applicant is technically, financially and legally qualified to serve the U.S. market.

Elimination or presumptive nonapplication of redundant reporting requirements not only will reduce the regulatory burden on non-U.S. licensed satellite operators serving the United States; it also will reduce the risk that foreign nations will respond to those requirements by establishing relicensing requirements for U.S.-licensed service providers.[4] Such reciprocal regulations could impede the efforts of U.S. satellite operators to gain access to foreign markets and could adversely affect the implementation of the WTO Basic Telecom Agreement.[5]

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however, with the notion that non-U.S. licensed operators should provide all of the financial and legal information required of U.S. licensees. Id.

[4] The principles of national sovereignty and administrative comity also argue for the Commission's acceptance of a foreign administration's determination that a satellite operator is qualified to provide service. As the Further Notice of Proposed Rulemaking acknowledged, "many foreign administrations would understandably expect the United States to accept the sufficiency of satellite licensing procedures abroad – as we expect them to accept the sufficiency of our procedures." Notice of Proposed Rulemaking, 11 FCC Rcd 18178 at 18184-86.

[5] The Report and Order acknowledges the risk of reciprocal response but concludes that if its "policy causes other countries to adopt licensing requirements for U.S. satellite operators seeking to provide service in that country, . . . we find it on balance to be a minimal burden when compared to the possibility that unrestricted entry by foreign-licensed satellite systems would vitiate our orbit efficiency policies." *Report and Order* at ¶ 159. This, however, is an inaccurate dichotomy: the choice is not between unregulated entry into the U.S. market and needless replication of the full panoply of U.S. licensing requirements. The Commission can minimize the risk of retaliation against U.S. licensees by requiring non-U.S. licensees to provide only so much technical information as is needed to facilitate

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II. The Commission Should Clarify Its Decision on Technical Requirements for Frequency Coordination of Non-U.S. Licensed Satellite Systems

ICO agrees that non-U.S. licensed satellite systems should file technical information required to facilitate domestic and international frequency coordination. Non-U.S. licensed MSS systems should not be required, however, to engage in duplicative frequency coordination activities concerning space segment operation when the international coordination provisions fully address this situation.[6] The international coordination procedures of ITU Resolution 46 and associated technical criteria, in particular, fully address the coordination of MSS satellite network space stations with U.S. MSS satellite systems and U.S. terrestrial radio systems. Avoidance of redundant coordination requirements also is fully consistent with the obligations of the U.S. under relevant International Telecommunications Union ("ITU") Radio Regulations pertaining to frequency allocations and coordination. ICO urges the Commission, therefore, to clarify that it will not impose additional technical requirements for coordination of non-U.S. licensed MSS space stations beyond those required by the ITU.

ICO also recognizes that the ability of non-U.S. licensed MSS systems to serve the U.S. market is dependent, not only upon the international frequency coordination process, but also upon the Commission's application of U.S. market access and spectrum access requirements. ICO requests, however, that the Commission administer its market and spectrum access requirements in conjunction with, rather than independently of, the ITU International frequency coordination provisions. Specifically, ICO requests that the FCC

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spectrum coordination, and by presuming the adequacy of other nations' financial and legal requirements subject to persuasive evidence to the contrary.

[6] ICO agrees, however, that MSS earth stations operating in the U.S. with a non-U.S. licensed MSS system must comply with U.S. technical requirements for domestic frequency coordination.

apply its market and spectrum access requirements as part of the process established by the FCC for consideration of applicants for each particular frequency band where non-U.S. licensed MSS systems have applied to be included in the processing round.

III. The Commission Should Reconsider Its Classification of ICO As An IGO Affiliate

The Commission also should reconsider its decision to classify ICO, for purposes of the Report and Order, as an IGO affiliate.[7] That decision is based on a definition of "IGO affiliate" that was not proposed in the Further Notice of Proposed Rulemaking and that includes any "entity created by an IGO, in which an IGO and IGO signatories maintain ownership interests."[8] This definition not only is vitiated by lack of notice and opportunity to comment,[9] but also is irrelevant to the FCC's expressed concern regarding affiliation, *i.e.*, an entity's ability to enjoy the immunities or other competitive advantages of an IGO. Notably, the fact that an entity was created by an IGO presents no competitive issue if the entity is legally and factually independent of the IGO. Similarly, the fact that IGO signatories have an ownership interest in an entity presents no competitive issue unless the entity can somehow leverage the IGO's intergovernmental status to secure an advantage in the marketplace.

ICO presents none of these competitive concerns. ICO was organized in consultation with the United States government to obviate any likelihood that ICO will benefit unfairly from its origins in Inmarsat or the continuing minority investment of Inmarsat signatories in ICO. Notably, as a result of Assembly of Parties deliberations, ICO since its inception has been organized as a private, commercial entity that is

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[7] *Id.* n.283.

[8] *Id.*

[9] *See* 5 U.S.C. §553; *National Black Media Coalition* v. FCC, 791 F. 2d 1016, 1022-23 (2d Cir. 1986).

constitutionally, managerially and operationally entirely separate from Inmarsat. Although ICO's list of investors includes Inmarsat signatories, those investors participate in ICO outside of their signatory roles and have independently chosen their levels of investment and investment vehicles.[10] At the urging of the United States government, and in order to preclude treatment as an IGO affiliate, ICO's board incorporated in ICO's organic documents the Inmarsat Principles, which include a number of commitments to open and nondiscriminatory operation, including nondiscriminatory access to national markets for all MSS systems and a prohibition on cross-subsidization between ICO and Inmarsat. Under these circumstances, ICO should not be subjected to heightened scrutiny as an IGO affiliate.

IV. The Commission Should Clarify the Competitive Element of Its Public Interest Inquiry

ICO agrees with the Commission's conclusion that the ECO-Sat test, through which the Commission explicitly used its licensing authority as a means of opening foreign telecommunications markets, may not be used to deny applications to serve the U.S. from WTO-member licensed or authorized satellites after the WTO Basic Telecom Agreement takes effect. ICO also agrees with the Commission's decision to replace the ECO-Sat test with a presumption in favor of unconditionally granting an application to serve the U.S. from a non-U.S. licensed satellite licensed by a WTO member country unless that application is shown to present a "very high risk to competition" in the U.S. satellite market.[11]

ICO is concerned, however, that the language of the Report and Order may be misread as permitting denial of applications to serve the U.S. from satellites licensed by

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[10] In fact, some Inmarsat signatories have declined to make a direct investment in ICO, while others have an investment level considerably higher than their participation in Inmarsat.

[11] Report and Order at ¶41.

WTO member nations on the basis of trade disputes or conduct that does not pose a very high risk of harm to consumers in the U.S. Specifically, the Report and Order lists, in the disjunctive, several concerns that will support a showing of very high risk to competition, *i.e.*, "market concentration, discrimination, below average variable cost pricing, monopoly supply of service. . ., *or* where the applicant has market power and could use that power to raise prices and limit output in the U.S. satellite market. . ."[12] This language may be misread in two ways. First, it may be misread as permitting denial of an application based on an applicant's "market concentration, discrimination, below average variable cost pricing [or] monopoly supply of service. . ." in foreign markets, even where that conduct does not pose a very high risk of harm to U.S. consumers. Second, the language may be misread as suggesting that applications will be denied on the basis of "market concentration, discrimination, below average variable cost pricing [or] monopoly supply of service. . ." in the U.S. satellite market that does not involve the use of market power to "raise prices and limit output in the U.S. satellite market."

As ICO pointed out in its Further Comments in these proceedings, and as the Report and Order does not dispute, the Commission may not limit entry to the U.S. market for competitive reasons except through application of the same antitrust principles that apply to U.S. operators.[13] Denial of applications on other competitive grounds will violate the market access commitments of the United States in the Basic Telecom Agreement .[14] ICO

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[12] *Id. (emphasis added).*

[13] ICO Further Comments at 7-10.

[14] The Report and Order states that the Commission's ability to consider competitive issues when reviewing applications to serve the U.S. market is confirmed by the cover note, in the United States final offer in the WTO basic telecom negotiations, of the right to impose "national treatment in accordance with U. S. law" on foreign investors. Report and Order at ¶46. That cover note, however, only confirms the ability of the United States to apply its own laws – including the antitrust laws – to non-U.S. operators under the principle of National Treatment. The cover note in no way limits the market access obligations of the

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therefore asks the Commission to confirm that its "very high risk to competition" test will not be used to deny applications on the basis of conduct that will not cause antitrust injury to consumers of satellite services in the United States. Specifically, the Commission should confirm that an applicant's or affiliate's "market concentration, discrimination, below average variable cost pricing [or] monopoly supply of service. . ."[15] in a foreign or domestic market may not be considered except as evidence of the applicant's or affiliate's ability " to raise prices and limit output in the U.S. satellite market. . ."[16] Such express confirmation of the scope of the "very high risk to competition" test will limit the likelihood that the Commission and non-U.S. licensed applicants will be confronted with frivolous oppositions based upon foreign trade disputes or complaints about marketplace behavior not involving any risk of harm to U.S. consumers.

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United States under the Basic Telecom Agreement, and ICO does not read the Report and Order as assuming that those obligations are so limited.

[15] Report and Order at ¶41.

[16] *Id.*

IV. Conclusion

The Report and Order establishes a promising framework for increased competition and consumer choice in the U.S. satellite market. Those benefits will be more fully realized if the Commission eliminates costly and redundant licensing and frequency coordination requirements, treats ICO as an independent entity authorized by a WTO member country and not subject to heightened scrutiny, and confirms that non - U.S. licensees will not be denied access to the U.S. market on the basis of competitive conduct that does not pose a very high risk of harm to U.S. consumers. Accordingly, ICO requests that the Commission grant this petition for clarification and reconsideration.

Respectfully submitted,

By: _____

Francis D.R. Coleman
ICO Global Communications
1101 Connecticut Avenue, N.W.
Suite 550
Washington, D.C. 20036
(202) 887-8111

Cheryl A. Tritt
Charles H. Kennedy
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1888
Telephone: (202) 887-1500

Attorneys for
ICO Global Communications

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CERTIFICATE OF SERVICE

I, Kathryn M. Stasko, do hereby certify that the foregoing **PETITION FOR CLARIFICATION AND RECONSIDERATION OF ICO GLOBAL COMMUNICATIONS** was hand delivered on this 5th day of January, 1998, to the following:

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Daniel Phythyon
Acting Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Chairman William E. Kennard
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Christopher J. Wright
General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 614
Washington, D.C. 20554

Commissioner Harold Furchtgott-Roth
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Diane Cornell
Chief
Telecommunications Division
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 838
Washington, D.C. 20554

Commissioner Michael K. Powell
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Cecily C. Holiday
Deputy Chief
Satellite & Radiocommunications Division
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 590
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Kathleen Campbell
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 500
Washington, D.C. 20554

Commissioner Gloria Tristani
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

Regina M. Keeney
Chief
International Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554

Thomas Tycz
Chief
Satellite & Radiocommunications Division
International Bureau
Federal Communications Commission
2000 M Street, N.W., - Room 800
Washington, D.C. 20554

Virginia Marshall
International Bureau
Federal Communications Commission
2000 M Street, N.W., - Room 590
Washington, D.C. 20554

James L. Ball
Assistant Bureau Chief
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 820
Washington, D.C. 20554

Robert M. Pepper
Chief
Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W., Room 822
Washington, D.C. 20554

Kathryn M. Stasko

Kathryn M. Stasko